No. 08-751

JAN, 12, 2009

IN THE

Supreme Court of the United States

COUNTY OF EL PASO, *ET AL.*,
Petitioners,

v.

MICHAEL CHERTOFF, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,
Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

BRIEF OF *AMICI CURIAE* THE CITY OF EAGLE PASS, TEXAS, AND OTHER CITIES AND OTHER AFFECTED PERSONS ALONG THE TEXAS-MEXICO BORDER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
INTEREST OF THE *AMICI*	2
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. SECTION 102(c) OF IIRIRA PRESENTS A UNIQUELY BROAD DELEGATION WITHOUT JUDICIAL REVIEW	10
II. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER A FEDERAL EXECUTIVE BRANCH AGENCY CAN NULLIFY STATE LAWS ON ITS OWN AUTHORITY	14
III. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER BROAD DELEGATIONS TO UNELECTED MEMBERS OF THE EXECUTIVE BRANCH REQUIRE THE AVAILABILITY OF JUDICIAL REVIEW	18
CONCLUSION	24
APPENDIX A—List of *Amici*	1a
APPENDIX B—Congressional Research Service Memorandum, *Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Feb. 9, 2005	2a

TABLE OF AUTHORITIES

CASES	Page(s)
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	19
Alden v. Maine, 527 U.S. 706 (1999)	14
Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971)	19, 22
Clinton v. City of New York, 524 U.S. 417 (1998)	11
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)	16
Department of Interior v. South Dakota, 519 U.S. 919 (1996)	22
Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976)	20
Fidelity Federal Savings and Loans Ass'n v. del Cuesta, 458 U.S. 141 (1982)	16
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	15
Gregory v. Ashcroft, 501 U.S. 452 (1991)	7, 14
Hines v. Davidowitz, 312 U.S. 52 (1941)	15
INS v. Chadha, 462 U.S. 919 (1983)	9, 18

TABLE OF AUTHORITIES

Page(s)

Mistretta v. United States,
488 U.S. 361 (1989) 9, 18

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 16

Printz v. United States,
521 U.S. 452 (1991) 14

Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (1999) 19

Skinner v. Mid-America Pipeline Co.,
490 U.S. 212 (1989) 9, 10, 18

South Dakota v. Department of Interior,
69 F.3d 878 (8th Cir. 1995), *vacated*,
519 U.S. 919 (1996) 22

Tafflin v. Levitt,
493 U.S. 455 (1990) 14

Touby v. United States,
500 U.S. 160 (1991) 9, 18

United States v. Bozarov,
974 F.2d 1037 (9th Cir. 1992),
cert. denied, 507 U.S. 917 (1993) 23

United States v. Hammoud,
381 F.3d 316 (4th Cir. 2004) (en banc),
vacated on other grounds, 543 U.S. 1097
(2005) 23

United States v. Nourse,
9 Pet. 8, 9 L. Ed. 31 (1835) 19

United States v. Widdowson,
916 F.2d 587 (10th Cir. 1990), *vacated*,
502 U.S. 801 (1991) 22

TABLE OF AUTHORITIES

Page(s)

Yakus v. United States, 321 U.S. 414 (1944) 9, 18

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 18

CONSTITUTION, STATUTES, RULES AND REGULATIONS

U.S. Const. amend. X 14

Administrative Procedures Act, 5 U.S.C. § 551 13

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Stat. 3009, 3009-554, (codified as amended at 8 U.S.C. § 1103 note) 2

- Section 102(c) ..... *passim*
- Section 102(c)(1) 7, 10, 20
- Section 102(c)(2)(A) 8, 18, 21
- Section 102(c)(2)(C) 8

Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6303-05 12

Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et. seq.* 12

Rivers and Harbors Act of 1899, Mar. 3, 1899, ch. 425, 30 Stat. 1121 12

OTHER AUTHORITY

Christopher Sherman, *One Hidalgo County Community Won't Escape Border Fence*, Assoc. Press, Mar. 21, 2008 5

TABLE OF AUTHORITIES

	Page(s)
Congressional Research Service Memorandum, *Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Feb. 9, 2005	12
Federalist No. 39 (James Madison) (Clinton Rossiter ed., 1961)	14

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STATEMENT

The City of Eagle Pass, Texas, and the other cities and entities along the Texas-Mexico border listed herein, respectfully submit this *amicus* brief in support of the petition for a writ of certiorari.[1]

[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribu-

INTEREST OF THE *AMICI*

Amici are cities, and other affected persons along the Texas-Mexico border who have been injured by waivers of state and local laws by the Secretary of the U.S. Department of Homeland Security, which are purportedly made pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"). The *amici* share the view that these waivers of state and local laws by an unelected federal official raise profound, unanswered questions about the elimination of any judicial review (except on constitutional questions) of an executive agency's delegated, wholly discretionary power to waive any statutes, including state and local statutes, that the official sees fit in order to accomplish a given goal. The Homeland Security Secretary's exercises of his waiver power to date have been especially troubling because he has purported to waive "in their entirety" all "state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" thirty-seven different federal laws, without specifying which state and local laws he is waiving, for how long, in which geographic area, and with respect to which parties. The Secretary also has unilaterally expanded the scope of section 102(c)'s waivers from those needed "to ensure the expeditions construction of barriers and roads" authorized by section 102 of the IIRIRA to those needed to ensure the "*upkeep* of fences, roads, supporting elements, drainage, erosion control, safety features, surveillance, communication, and detection equipment of all types, radar and radio

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tion to its preparation. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

towers, and lighting" in the Project Areas. (Pet'r's App. 4a, 15a) (emphasis added).

Each of the *amici* and their citizens are directly affected or potentially will be affected by the Secretary's waivers. The *amici* submit that the Secretary has impermissibly encroached on the most fundamental aspect of the sovereignty of our governments and the sovereignty of the State of Texas: the power to govern by our own duly enacted laws. In their scope, vagueness, apparent permanence (waiver of laws necessary to "upkeep," not just construct, the fence) and judicial unreviewability, the waivers issued by the Secretary of Homeland Security have dramatically inhibited the power of the governmental *amici*, and the State of Texas, to prescribe and enforce reasonable regulations necessary to preserve the public order, health, and safety.

The Secretary's waivers jeopardize the ability of the governmental *amici* to carry out their statutory duties to interpret and enforce Texas, county and municipal laws, regulations and ordinances. The waivers of all unnamed "state, or other laws, regulations and legal requirements . . . deriving from, or related to the subject of" the thirty-seven identified federal statutes waived leaves the *amici* and their citizens uncertain about the state of the law in their jurisdictions. The waivers call into question the continuing validity of numerous state statutes, county orders, judicial decrees and government contracts that might be construed as "deriving from, or related to the subject of" the enumerated federal statutes, including among others: the Texas Local Government Code, Antiquities Code, Natural Resources Code, Health and Safety Code, Agriculture Code, Parks and Wildlife Code, Penal Code, and Water Code and

Auxiliary Laws; county orders related to health and safety, waste disposal, and the environment; provisions of the municipal codes related to water and sewage, storm water management, air pollution, and noise control; city and county contracts, including contracts with the water improvement districts and others, for the delivery of water to the *amici* and their citizens; certain judicial decrees adjudicating water rights; contracts between water improvement districts and the United States authorizing the districts to divert water from the Rio Grande River; and city grant agreements with the State of Texas, which require the cities to certify to compliance with federal laws, including several of those waived, as a condition of receiving grant money.

The Secretary's exercise of his waiver authority thus interferes with the police powers of the governmental *amici* by rendering it impossible for the governmental *amici* to know which laws to enforce and which are waived, or to know against whom (if anyone) the laws may be enforced. It directly hinders the ability of the governmental *amici* to protect the health, safety and general welfare of their people by trampling the basic laws and regulations that have been enacted for those purposes.

Moreover, the Secretary's waivers have blockaded or will blockade the municipalities and counties' abilities to protect the health, safety and welfare of their citizenry in a quite concrete way as well. The "border" barriers are being constructed north of the Rio Grande River flood plain, sometimes as much as a mile inland. Property, businesses and houses in U.S. territory, but now on the south (Mexican) side of the wall, are being stranded from their governments. Entire neighborhoods will be on the south side of the

wall. *See* Christopher Sherman, *One Hidalgo County Community Won't Escape Border Fence*, Assoc. Press, Mar. 21, 2008. The Secretary's border barriers, then, will be an actual physical barrier prohibiting the governmental *amici* to fulfill their sovereign mandates to protect their citizens from crime, fire and other hazards. These barriers that isolate houses, businesses and communities will impede or prevent the governmental *amici* from rescuing or assisting their citizens in times of natural disaster (such as the flooding of the Rio Grande River). The Secretary's unbridled exercise of his wavier powers literally imperils the safety and welfare of many of the citizens of the governmental *amici*.

The waivers not only impair the *amici's* ability to serve their citizens and fulfill essential governance functions, but impose financial costs on the *amici* associated with implementing the Secretary's waivers. The waivers further imperil the citizens of the *amici* by interfering with the water improvement districts' access to and ability to maintain their canals, potentially damaging the facilities and infrastructure on which the districts rely to deliver water, potentially generating debris that could clog the districts' flood control infrastructure, circumventing the districts' permitting processes for use of district property, and interfering with the districts' standards for bridge construction, road maintenance and dust pollution, among other things - all of which threaten the supply of clean water to the citizens of *amici*. All of the effects listed above will impose significant financial costs on the *amici* that will, in turn, inevitably be passed through to the citizens of *amici*.

A list of the *amici* appears as Appendix A, reproduced at 1a.

SUMMARY OF ARGUMENT

To our knowledge, neither this Court, nor any federal court of appeals, has ever been asked to review a delegation of power to a single, unelected federal executive officer to effectively nullify or, at a minimum, suspend state and local statutory requirements that is this far reaching. Certainly no appellate court has ever upheld such a broad delegation of legislative power to the executive branch in the absence of judicial review. While the Constitution gives Congress the authority to regulate matters directly and to preempt contrary state regulation, the Constitution does not give federal officials the power to "waive" state laws of their choosing. *Amici* are aware of no appellate decision upholding such a waiver power. *Amici* also are aware of no instance in which an appellate court has construed authority to "waive" laws to mean that Congress intended to "preempt" state regulation or legal requirements.

The Court should grant the writ of certiorari to address whether such a delegation can be made without judicial review, and whether such a delegation can ever be made to "waive" attributes of state sovereignty, including the local police powers of the State of Texas, the City of Eagle Pass, and the other cities and local governments of Texas and the border states. These powers were reserved by the Tenth Amendment to the states. The power to preempt state laws and regulations delegated to Congress in the Constitution does not encompass the power of an unelected cabinet officer to rule by fiat in the border regions of this nation. The unrestricted grant of power to an unelected official to waive any law on the books he deems "necessary" for his purposes, including not only substantive laws but also procedural

statutes, raises the specter of arbitrary power and the loss of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Section 102 of the IIRIRA presents this Court with the most sweeping and starkest possible context to address this question, because Congress could scarcely have made a broader delegation than this one. Section 102(c)(1) of the IIRIRA grants the Secretary of Homeland Security, "[n]otwithstanding any other provision of law," the "authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." Pursuant to this authority, the Secretary already has issued five waivers nullifying thirty-seven federal statutes and all state and local laws, rules, regulations and legal requirements "deriving from, or related to the subject matter of," those specified federal statutes along much of the border with Mexico. The Secretary has not defined for local officials which particular laws are no longer in force. Nor has he explained whether they are waived in whole or just in part. Nor has he identified the geographical boundaries (inland from the border) of the waiver, the duration of the waiver, or even against whom these waivers apply.

The Secretary has asserted that these sweeping waivers are "necessary." But contrary to what normally would occur in the context of reviewable

agency action, he has offered no reasons why. Perhaps even more troubling, the Secretary has *sua sponte* expanded his waiver powers beyond those provided by Congress. Section 102(c) grants the Homeland Security Secretary "the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious *construction* of the barriers and roads under this section." (emphasis added). The Secretary's waivers, by contrast, waive laws not only concerning the construction of the barriers, but also with respect to the "upkeep of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communications, and detection equipment of all types, radar and radio towers, and lighting" in the Project Areas. (Pet'r's App. 4a, 15a.) The Secretary may believe that his waivers are permanent.

Neither the scope of the waivers, nor the Secretary's expansion of his statutory authority by administrative fiat, nor the actual "necessity" of the waivers, nor the possibly permanent nullification of state laws, can be reviewed by the courts except on constitutional grounds. IIRIRA § 102(c)(2)(A).[2] Indeed, because of the statute's sixty-day statute of limitations (as explained in greater detail below), this case presents the last chance for *any* court to ensure that the Secretary's April 3, 2008 waivers conform to the Constitution. Absent review by the Court, every city and county along the border, and their citizens, businesses and water districts, will be subjected to the Secretary's interpretation of the scope of his dele-

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[2] The statute also precludes any right of appeal to the Courts of Appeal following a determination of a constitutional question. IIRIRA § 102(c)(2)(C).

gated authority. He will be the sole arbiter of which laws he has waived, whether the waived laws are partially or totally inoperative, whether the hundreds of state and local laws implicated by his ambiguous waiver have been preempted and to what extent, how long the waivers shall remain in effect, and whose compliance with the laws are waived. This unchecked power over the communities of Texas (and the rest of the border states) contravenes basic principles of federalism and decimates the "residual and inviolable sovereignty" of the states that the Framers envisioned and that has been part of our Constitutional framework since the founding.

The absence of judicial review of the Secretary's waiver power is at the heart of the problems posed by the statute. Assurance of judicial review has been crucial to this Court's review of constitutional challenges to Congressional delegations of power and preemption of state laws and regulations. In particular, the availability of judicial review underlies this Court's "intelligible principle" jurisprudence. *See, e.g.*, *Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 426 (1944).

However, this Court has never directly addressed the question of whether, in the case of an exceptionally broad delegation, satisfaction of the "intelligible principle" test requires the availability of judicial review. Put another way, can the "longstanding principle" that Congress may delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions

such that a Court could 'ascertain whether the will of Congress has been obeyed . . .'" be satisfied if the "court" is entirely removed from the principle's operation? *See Skinner*, 490 U.S. at 218 (emphasis added). This Court has never directly answered this question, which is of critical importance to ensuring that Congress's delegation of authority to executive branch agencies is done in a manner consistent with separation of powers. The *amici* respectfully submit that this, too, renders a grant of certiorari important and necessary.

ARGUMENT

I. SECTION 102(c) OF IIRIRA PRESENTS A UNIQUELY BROAD DELEGATION WITHOUT JUDICIAL REVIEW

Whether a federal executive branch agency can freely and without judicial review waive any state law that it, in its unfettered discretion, deems "necessary" to its purposes, and whether the non-delegation principle requires judicial review for especially broad grants of policymaking authority, are questions presented here in the context of an unprecedently sweeping delegation of authority by Congress to the Homeland Security Secretary. Section 102(c) of the IIRIRA provides:

> (c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1).

This sweeping delegation of authority is unprecedented. Certainly, a number of federal laws have authorized an agency official to waive legal requirements in particular circumstances, but such delegations typically involve directions to the executive to waive particular provisions of particular federal laws (most commonly, only provisions of the same law containing the waiver authority), and such waivers usually are subject to judicial review. Crucially, in every instance we know of where the executive branch has been authorized by Congress to waive a law, the laws that are permitted to be waived are *federal* laws. We know of no instance in which a federal official has been given the right to simply "waive" state and local laws "necessary" in his view to achieve his purposes.

Moreover, prior delegations to an executive agency of the power to waive laws usually, if not always, have involved the waiver of laws within the purview of that agency's expertise and specialized knowledge, and therefore differ from "the delegation at issue here in that agencies often develop subsidiary rules under the statute," thus diminishing "the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation." *Clinton v. City of New York*, 524 U.S. 417, 489 (1998) (Breyer, J., dissenting) (citing 1 K. Davis, *Administrative Law* § 3:15, pp. 207-208 (2d ed. 1978)).

Here the delegation, while limited by Congress as to purpose, is unlimited as to application. The Secretary of Homeland Security, upon a mere pronouncement that he finds waiver "necessary," can waive any law promulgated by any authority in effect anywhere in the nation. As far as we can determine, Congress has never delegated to a federal agency anything ap-

proaching such an omnibus waiver authority. As an independent study by the Congressional Research Service concluded:

> After a review of federal law . . . we were unable to locate a waiver provision identical to that of § 102 of H.R. 418—*i.e.*, a provision that contains 'notwithstanding language,' provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws. Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act that authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar laws.

Congressional Research Service Memorandum, *Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Feb. 9, 2005, at 5a-6a, reproduced at Appendix B.

The Secretary's exercise of the Section 102(c) waiver delegation has been even more unfettered in practice than it is in authorization. The Secretary's two April 3, 2008, waivers, covering almost 500 miles of territory along the Mexican border from California to Texas, waive "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" thirty-seven laws, including among other things environmental laws, historic preservation acts, the Rivers and Harbors Act, the Federal Land Policy and Management Act, the Federal Grant and Cooperative Agreement Act of 1977, acts protecting the exercise of religious

freedom, and the entirety of the Administrative Procedures Act.[3]

Secretary Chertoff's state law waivers are potentially even broader, because the Secretary did not identify which state or local laws he is waiving. Nor did he specify when the waivers will end. *Amici* do not even know *if* they will end, as Congress instructed, upon completion of the construction of the roads and barriers, because the April 3, 2008 waivers metastasized Congress's delegation to waive when "necessary . . . to ensure the expeditious construction of the barriers and roads" into a waiver for the purpose of, among other things, the "upkeep of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communications, and detection equipment of all types, radar and radio towers, and lighting" in the Project Areas. (Pet'r's App. 4a, 15a.) Nor has the Secretary provided an explanation of why he finds it "necessary" to waive all provisions of 37 federal statutes and all provisions of every state and local law, ordinance, rule, regulation or requirement relating to them. (*Id.*)

The sweeping delegation without judicial review to the Homeland Security Secretary in Section 102(c) of the IIRIRA and his exercise of that delegated authority to bulldoze wide swathes of unidentified state and local law not only to construct barriers and roads, but to "upkeep" many other things, raises vital questions that this Court should address about whether Congress (or the Secretary) have overreached into the sovereign domain of the states and

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[3] The laws that the Secretary has identified that he is waiving are identified in the waivers, which are included in the Appendix to the Petition. (Pet'r's App. 4a - 5a, 15a - 17a.)

whether there has been an unconstitutional delegation of power which, in the utter absence of judicial review, violates the separation of powers doctrine.

II. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER A FEDERAL EXECUTIVE BRANCH AGENCY CAN NULLIFY STATE LAWS ON ITS OWN AUTHORITY

Under the Supremacy Clause, federal officials have no inherent authority to waive state laws. On the contrary: it "is incontestable that the Constitution established a system of dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (*citing Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The states "retain a residuary and inviolable sovereignty." *Alden v. Maine*, 527 U.S. 706, 714-15 (1999) (quoting *The Federalist No. 39*, p. 245 (C. Rossiter ed. 1961) (J. Madison)). Residual state sovereignty is expressly protected by the Tenth Amendment of the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. The Constitution also contemplates, as Madison expressed it, that the "local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *The Federalist No. 39*, at 245, *quoted in Printz*, 521 U.S. at 920-21.

The district court below offered several justifications for upholding the Secretary's assertion of power

to preempt state and local laws. None pass constitutional muster.

One justification presented by the district court was that Section 102(c) is itself an express preemption clause. This claim is untenable. Section 102(c) authorizes the Secretary to "waive" laws that might, in his judgment, impede the expeditious construction of the border fence. While federal officials are occasionally given authority to waive *federal* laws that they are charged with administering, federal officials have no authority to *"waive"* state laws. State laws can be *preempted* only when they conflict with or frustrate federal laws, or when Congress clearly intends that state laws be displaced, but preemption is not waiver.

The district court concluded that the Homeland Security Secretary's exercise of his waiver power reflects nothing more than an application of the principle that state laws that conflict with federal law are necessarily preempted. The court reasoned that "even if the Waiver Legislation does not contain explicit preemptive language," state law is still "conflict preempt[ed]" by the Secretary's waivers. (Pet'r's App. 40a.) While agency action can preempt state law without an express grant of preemptive authority where a *court* determines that "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)), or when a *court* finds that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), the determination must nonetheless be left to a *court*—not to unreviewable administrative fiat. By contrast, here the Secretary

himself has made the decision to preempt all state and local laws "of, deriving from, or related to the subject of" each of thirty-seven federal statutes that he had waived. This far exceeds anything previously recognized as conflict preemption. Moreover, precedent teaches that the Secretary's articulated basis for preemption is inadequate. "To prevail on the claim that the regulations have pre-emptive effect, [the Secretary] must establish more than that they touch upon 'or relate to' that subject matter." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-384 (1992)).

There is a more fundamental flaw with the district court's conflict preemption argument. Even if the district court correctly applied the conflict preemption framework applicable here, "question[s] remain[] whether the [Secretary] acted within [his] statutory authority in issuing the pre-emptive" regulation and whether or not there actually is a conflict. *Fidelity Fed. Sav. and Loans Ass'n v. de la Cuesta*, 458 U.S. 141, 159 & n. 14 (1982). After all, the Secretary has not enumerated which state and local laws are displaced; nor does he explain why all laws "of, deriving from, or related to the subject of" his mandate under the IIRIRA are *actually conflicting* with execution of that mandate. Without judicial review, the district court's assertion that the "Secretary, pursuant to the Supremacy Clause, has only waived state and local laws which interfere with Congress's purpose to construct the border barrier" (Pet'r's App. 40a) cannot be verified, because the Secretary has not identified which state and local laws he has waived. Moreover, the district court's assurance also is betrayed by the actual language of the waivers, which provide that the Secretary is waiving state and

local laws that he considers necessary for the "upkeep" of things that are not barriers and roads. Nor can the district court's assurance be tested by anybody in any forum, and thus it cannot be enforced.

The district court also offers the hollow consolation that after "carefully reviewing the Waiver Legislation, the Court concludes the Secretary's waivers do not affect the validity of the state and local laws." (Pet'r's App. 41a.) "Rather, the waivers merely suspend the effects of the state and local laws. The state and local law remain operative to the extent they have not been preempted by the Waiver Legislation according to its own terms, *i.e.*, those laws that do not interfere with the expeditious construction of the border fence." (*Id.*) Again, however, the district court's assurance is betrayed by the terms of the waivers. The "suspension" of laws is of indefinite duration, and may be permanent with respect to "upkeep." How, thus, do laws remain "valid" when they are indefinitely, and perhaps permanently, unenforceable? How can it even be determined to what extent the laws remain operative when the waivers are expressly not limited to the construction of the border fence? How can any of the district court's assumptions be tested when there is no forum for review of the Secretary's decisions? After all, the district court's decision, coupled with Section 102(c)'s sixty-day statute of limitations, makes the Secretary the sole arbiter of preemption decisions. The statute's preclusion of judicial review, once this narrow window has closed, guarantees that any dispute over which laws fall within the vague bounds of the Secretary's declarations of preemption will be resolved by agency fiat. This Court should grant review to confirm that these questions are inherently judicial, and that no agency is entitled to confer upon itself a lim-

itless and unreviewable power to waive state and local laws as it chooses.

III. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER BROAD DELEGATIONS TO UNELECTED MEMBERS OF THE EXECUTIVE BRANCH REQUIRE THE AVAILABILITY OF JUDICIAL REVIEW

Section 102(c) of the IIRIRA forbids judicial challenges to Secretary Chertoff's waiver determinations and the exercise of his waiver power. Only constitutional challenges may be made.

The Court has consistently highlighted the availability of judicial review of administrative action as an essential predicate to upholding broad delegations of congressional power under the "intelligible principle" requirement. *See, e.g., Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 436 (1944).

The availability of judicial review ensures executive compliance with congressional will, and thereby ensures that the executive branch is limited to enforcing the law, rather than making it. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby*, 500 U.S. at 170 (Marshall, J., concurring) (*citing Skinner*, 490 U.S. at 218-19).

In the modern era of broad delegations to administrative agencies, judicial review assures the continuing validity of Chief Justice Marshall's observation:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 9 Pet. 8, 28-29, 9 L. Ed. 31 (1835).

Therefore, "[o]ur constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (1999) (Thomas, J., dissenting). This insight underlies the well-established presumption of the reviewability of agency action. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). "Concepts of control and accountability define the constitutional requirement." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three judge panel) (Leventhal, J.).

The waiver orders at issue illustrate the importance of this protection. The Secretary purported to interpret the statutory language defining "construction" to include, among other things, "*upkeep* of fences, roads, supporting elements, drainage, erosion

controls, safety features, surveillance, communication, and detection equipment of all types, radar and radio towers, and lighting." (Pet'r's App. 4a, 15a.) (emphasis added). This interpretation is seemingly at odds with the statute's plain command that the Secretary exercise his waiver authority only where "necessary to ensure expeditious *construction*"—not "upkeep"—of the border fence. IIRIRA § 102(c)(1) (emphasis added). Given Section 102(c)'s preclusion of judicial review for all but constitutional questions, however, there is no way the *amici* or other aggrieved parties can challenge the Secretary's expansive interpretation of his own power. The combination of a broad delegation and the preclusion of review thus permits the Secretary to extend the waivers' duration indefinitely or even permanently.

The uncertainty surrounding the duration of the waivers is not the only ambiguity in the Secretary's orders. It is unclear precisely which local laws have been waived. It is also unclear whether the Secretary was exempting only himself from compliance with our laws or the laws of Texas, or whether he was declaring all persons and governmental entities exempt from these legal requirements. Likewise, it is unclear how wide an area of land is covered by the orders.

"Congress has been willing to delegate its legislative powers broadly and the courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (*en banc*) (Leventhal, J., concurring) (footnote omitted), *cert. denied*, 426 U.S. 941 (1976). An excessively broad waiver provision that does not require the Secretary to provide reasons, and whose

invocation is not subject to judicial review, obfuscates any assessment of what the congressional will is, or whether it is being followed. Indeed, selective waiver actions by the Secretary may allow the agency to make law in a way that bypasses Article I procedures.

Under the terms of the statute, the only authority with the power to resolve non-Constitutional issues is the Secretary himself. Neither *amici* nor any other government body or private citizen will have any recourse to any court if the Secretary fails to resolve on ambiguity or a dispute, or does so in a way an aggrieved party regards as unlawful, or issues further waivers expansively construing the scope of this waiver authority. It is left to the Secretary alone to determine the scope of his powers vis-á-vis those of the *amici* and state and local governments, without any judicial check.

The potential impairment of governmental and private rights by the Secretary's orders is further compounded by Section 102(c)'s inordinately short statute of limitations. While the statute permits the district courts to hear "claim[s] * * * alleging a violation of the Constitution," such actions must be filed within sixty days of the date of the Secretary's *waiver* order—not sixty days from the infliction of any harm (even of constitutional stature) caused thereby. IIRIRA § 102(c)(2)(A). Absent judicial review, the Secretary's waiver of all state and local laws "of, deriving from, or related to the subject of" the federal statutes he has waived confers upon him the otherwise judicial function of determining whether and when state laws have been displaced by his actions once the sixty days have run. (Pet'r's App. 4a, 15a.) Moreover, the Secretary's actions may affect private, as well as public, rights, such as valuable water

rights currently held by municipal water authorities, or the rights of the private individuals and firms that purchase water from these authorities. The time even to constitutionally challenge these infringements of rights may have run even before the Secretary identifies which rights he has decided to infringe.

As described above, prior authority from this Court suggests the importance of judicial review as a predicate to the resolution of non-delegation claims. There has arisen, however, uncertainty and a split among the lower courts as to whether judicial review is required, an uncertainty that underlies the district court's reasoning on this point.

In *Department of Interior v. South Dakota*, 519 U.S. 919 (1996), this Court vacated and remanded without need for argument a judgment of the Eighth Circuit, after the Solicitor General had effectively conceded that the agency's action was judicially reviewable. The decision below is at odds with this decision of the Eighth Circuit, a decision of the Tenth Circuit, and a prominent three-judge district court decision from the District of Columbia, all of which state that a permissible intelligible principle for the exercise of delegated power must be susceptible of analysis by a court. *See South Dakota v. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996); *United States v. Widdowson*, 916 F.2d 587 (10th Cir. 1990), *vacated*, 502 U.S. 801 (1991); *Amalgamated Meat Cutters*, 337 F. Supp. at 746.

However, the dissenting opinion in *South Dakota v. Dep't of Interior* appears to raise doubts about the necessity of judicial review to a valid delegation of legislative power. 519 U.S. at 921-22 (Scalia, J., dissenting). This uncertainty is reflected in decisions

from the Fourth and Ninth Circuits. *United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc) ("it is not clear whether the nondelegation doctrine requires any form of judicial review"), *vacated on other grounds*, 543 U.S. 1097 (2005); *United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (reversing district court's decision that the Export Administration Act violated the non-delegation doctrine because of the lack of a provision for judicial review), *cert. denied*, 507 U.S. 917 (1993).

This case presents the question in the starkest possible way. Section 102(c) of the IIRIRA presents the Court with a nearly unprecedented delegation of authority to waive any "legal requirements" in the nation. That authority is unchecked by any judicial review of whether the administrative agency is making those waivers in compliance with congressional will and in a reasoned fashion. The Secretary has employed this discretion aggressively, without substantive explanation, and to the direct detriment of the *amici* and their citizens. The characteristics of the challenged statute and its implementation make it an ideal vehicle to resolve the question of whether the grant of such broad waiver power to an unelected official, without judicial review of his use of that power, is constitutional.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

List of Amici

The following *amici* join in this brief:

City of Eagle Pass, Texas by resolution of the City Council.

Cameron County, Texas Commissioner John Wood.

City of Brownsville, Texas by authorization of Mayor Patricio M. Ahumada, Jr.

City of McAllen, Texas by action and authorization of the City Commission.

Chairman of the Texas Border Coalition and Mayor of Eagle Pass, Texas Chad Foster.

APPENDIX B

[LOGO]

Congressional Research Service

Memorandum February 9, 2005

SUBJECT: **Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders**

FROM: Stephen R. Viña and Todd B. Tatelman
Legislative Attorneys
American Law Division

Section 102 of H.R. 418, the REAL ID Act, captioned "Waiver of Laws Necessary for Improvement of Barriers at Borders," provides the Secretary of Homeland Security with authority to waive all laws he deems necessary for the expeditious construction of the barriers authorized to be constructed by § 102 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) (P.L. 104-208, Div. C, codified at 8 U.S.C. § 1103 note) and bars judicial review of such waiver decisions. This memorandum discusses the waiver provision in general; the extent to which Congress has passed laws that provide waivers comparable to §102 of H.R. 418; and the judicial review provisions. For background information on the border fence and § 102 of IIRIRA please refer to CRS Report RS 22026, *Border Security: Fences Along the U.S. International Border*.

H.R. 418, §102

Section 102 of H.R. 418 would amend § 102(c) of IIRIRA to read as follows:

> (c) Waiver—
>
> (1) IN GENERAL—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.
>
> (2) NO JUDICIAL REVIEW—Notwithstanding any other provision of law (statutory or non-statutory), no court shall have jurisdiction—
>
> (A) to hear any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1); or
>
> (B) to order compensatory, declaratory, injunctive, equitable, or any other relief for damage alleged to arise from any such action or decision.

Waiver Provisions

If enacted, the new § 102 would provide the Secretary of Homeland Security with not only the authority to waive *all* laws he determines necessary to ensure the expeditious construction of the barriers and roads under § 102 of IIRIRA, but the *requirement* that the Secretary do so. This provision could provide the Secretary with broader waiver authority than what is currently in § 102(c) of IIRIRA. This authority would apparently include laws other than the

Endangered Species Act and the National Environmental Policy Act, but may not include a waiver of protections established in the Constitution.[1] All laws waived, however, must be determined by the Secretary to be necessary to ensure expeditious construction of the barriers and roads. The waiver authority provided by this amendment would also seem to apply to all the barriers that may be constructed under the authority of § 102 of IIRIRA—i.e., both to barriers constructed *in the vicinity of the border to deter illegal crossing in areas of high illegal entry*[2] and to the barrier that is to be constructed near the San Diego area.

Congress commonly waives preexisting laws, though the process necessary to complete the waiver and the number of laws waived vary considerably from provision to provision. Even more common is the use of the phrase, "notwithstanding any other provision of law." While the use of a broad "notwithstanding any

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[1] See discussion *infra*. During debate of a similar exemption provision for the border fence in the 108th Congress, supporters argued that labor and other non-environmental laws would not be considered as included in the phrase "any other laws." 151 Cong. Rec. H8899-H8901 (debate of amendment to H.R. 10). It is also not clear if state laws would be included in this waiver provision.

[2] There does not appear to be any statutory or regulatory definition for "high illegal entry." Note however, that over the last seven years 97% of all illegal alien apprehensions were made along the Southwest border. *See* CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*. Such a high percentage could be noted by those who might contend that the authority in § 102(a) of IIRIRA is more applicable, at least for now, to our Southwest borders; ultimately, however, it is the Secretary of DHS who determines places of "high illegal entry" under the section.

other provision of law" rarely settles the interpretive question, such directives seem facially preclusive, and some courts have determined that "notwithstanding" language may serve to explicitly preempt the application of other laws.[3] Other courts, however, have held that such provisions are generally not dispositive in determining the preemptive effect of a statute.[4]

After a review of federal law, primarily through electronic database searches and consultations with various CRS experts, we were unable to locate a waiver provision identical to that of §102 of H.R. 418—i.e., a provision that contains "notwithstanding language," provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws.[5] Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act that authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar

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[3] *See e.g., Puerto Rico v. M/V Emily S.*, 132 F.3d 818 (1st Cir. 1997). In instances where "notwithstanding" language has been deemed controlling, courts sometimes buttress such decisions with an analysis of the underlying directives or legislative history of a statute. *See e.g., Illinois Nat'l Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1402 (D.C. Cir. 1998).

[4] *See e.g., E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 1348 (9th Cir. 1993); *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996).

[5] Our search did not include a review of annual appropriations language, which may include similar waiver provisions. It should be noted however, that as a general proposition, appropriations language is limited to the year of the appropriation, which may limit the application of any waiver.

laws. The most analogous provisions that we located appear to be, at least on their face, the following:[6]

- 43 U.S.C. § 1652(c): Allows the Secretary of the Interior and other Federal officers and agencies the authority to waive any procedural requirements of law or regulation which they deem desirable for authorizations that are necessary for or related to the construction, operation, and maintenance of the Trans-Alaska oil pipeline system (e.g., rights-of-way, permits, and leases).[7]
- 25 U.S.C. §3406: Allows the Secretaries of the Interior, Labor, Health and Human Services, and Education, notwithstanding any other law, to waive any statutory requirement, regulation, policy, or procedure promulgated by their agency that is identified by a tribal government as necessary to implement a submitted tribal plan under the Indian Employment, Training and Related Services Demonstration Act of 1992, as amended.
- 20 U.S.C. §7426: Provides almost identical waiver language to that of 25 U.S.C. §3406, but for plans submitted by tribal governments

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[6] Similarly, we found some provisions that exempt certain transactions or entities from all laws. *See e.g.*, 49 U.S.C. §11321 ("A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.").

[7] It is unclear how broadly a procedural requirement of law has been or could be interpreted.

for the integration of education and related services provided to Indian students.

There are also many other provisions that arguably grant broad waiver authority similar to that of § 102, but contain qualifications or reporting requirements that seem to limit their breadth.[8] Some of these waiver provisions grant the President or the head of an Executive agency the authority to waive a law[s] if deemed necessary in the *national interest* or in the interest of *national defense*. We cite here, some examples of this type of waiver authority:[9]

- 43 U.S.C. §2008: Allows the President to waive provisions of federal law he deems necessary in the national interest to facilitate the construction or operation of crude oil transportation systems or the Long Beach-Midland project. The President must submit his waiver to Congress, and Congress must pass a joint resolution before the President can take such actions under the waivers.
- 15 U.S.C. 2621: Allows the Administrator of the EPA to waive compliance with the Toxic Substances Control Act upon a request and determination by the President that the requested waiver is necessary in the interest of national defense.

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[8] Examples of waiver authority with a congressional notification element include: 15 U.S.C. §719f; 22 U.S.C. §2378; 22 U.S.C. §2371; and 41 U.S.C. §413. Other examples of broad yet somewhat more limited waiver authority include: 10 U.S.C. §433; 22 U.S.C. §3861; 25 U.S.C. §1680h; 48 U.S.C. §1469d; and 50 U.S.C. §198.

[9] Other waiver authority in the national interest include: 10 U.S.C. § 1107(a); 22 U.S.C. §2375(d); 29 U.S.C. §793; 42 U.S.C. §6212(b); 42 U.S.C. §6393(a)(2); 50 U.S.C. §2426(e).

- 10 U.S.C. §433: Allows the Secretary of Defense, in connection with a "commercial activity," to waive federal laws pertaining to the "management and administration of Federal agencies," if compliance would create an unacceptable risk to an authorized intelligence activity. This provision further requires that the waiver be in writing and specifically describes the types of activities that pertain to the "management and administration of federal agencies," though it does not specify the actual laws.

As mentioned above and as the examples we have set forth arguably demonstrate, the breadth of waiver authority granted by § 102 of H.R. 418 does not appear to be common in the federal law searched.

Judicial Review Provisions

By including the language "no court," §102(c)(2) of H.R. 418 appears to preclude judicial review of a Secretary's decision to waive provisions of law by both federal and *state* courts. It is generally accepted that Article III of the United States Constitution grants Congress the authority to regulate the jurisdiction, procedures, and remedies available in federal courts.[10] However, what remains uncertain is whether Congress's authority, pursuant to Article III, extends to the jurisdiction, procedures, and remedies of state courts. In addition, it remains uncertain to what extent Congress has Article III authority to prevent courts, state or federal, from addressing and

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[10] Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. Article III.

remedying issues arising under the United States Constitution.

With respect to Congress's ability to control the jurisdiction of state courts, the Supreme Court has ruled that subject to a congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except for suits between States, suits in which either the United States or a foreign state is a party, and those considered within the traditional jurisdiction of admiralty law.[11] Thus, it appears possible to argue that Congress has a plenary power to allocate jurisdiction between the state and federal courts. In other words, if, for example, Congress can make jurisdiction over an area of law exclusively federal,[12] thereby depriving state courts of any ability to hear the claim, it appears that Congress may also be able to remove a cause of action

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[11] *See* 28 U.S.C. §§ 1251, 1331 *et seq.* (2004). In fact, the presumption is that state courts enjoy concurrent jurisdiction, and Congress must explicitly or implicitly confine jurisdiction to the federal courts to oust the state courts. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-84 (1981); *see also Tafflin v. Levitt*, 493 U.S. 455 (1990); *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990). For example, Justice Scalia has argued that, insomuch as state courts have jurisdiction generally because federal law *is* law for them, Congress can provide exclusive federal jurisdiction only by explicit and affirmative statement in the text of the statute, but as can be seen that is not now the rule. *See Tafflin v. Levitt*, 493 U.S. 455, 469 (1990).

[12] Perhaps the best example of an area of law that Congress has made exclusively federal is immigration. Federal Courts, however, also appear to have exclusive jurisdiction over the federal antitrust laws, despite the fact that Congress has never spoken either expressly or implicitly. *See General Investment Co. v. Lake Shore & Michigan Southern R.R. Co.*, 260 U.S. 261, 287 (1922).

from state courts without concurrently granting jurisdiction to the federal courts.

State courts, however, are often considered to be independent and autonomous from the federal court system. This independent status has led some scholars to argue that because the Constitution appears to reserve to the states the authority to control the jurisdiction of their own courts, Congress's "only means of allocating jurisdiction is through control of the federal court's jurisdiction."[13] The argument that state courts are autonomous can be derived, in part, from the Supreme Court's doctrine with respect to its ability to review decisions from state courts. While the Court has the authority to review a decision of a state's highest court, it has repeatedly held that it will not do so if the decision rests upon adequate and independent state grounds.[14] This rule is arguably designed to protect a state's interest in developing and applying its own laws. Thus, it would appear that an argument can be made that Congress does not possess the authority to regulate the jurisdiction of state courts directly. It may be the case, however, that Congress's ability to control the jurisdiction of the federal courts indirectly affects and alters the

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[13] Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1080 (1992) (*citing Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990); *Gulf Oil Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

[14] *See Colman v. Thompson*, 501 U.S. 722, 729 (1991) (stating that the Court will not review a state court decision "if the decision of the court rests on a state law ground that is independent of the federal question and adequate to support judgment").

jurisdiction of the state courts, which would appear to preserve their autonomous status.[15]

Turning to Congress's ability to remove jurisdiction with respect to claims arising under the Constitution, it appears that Supreme Court precedent requires that at least some forum be provided for the redress of constitutional rights.[16] While it appears that the Supreme Court has not directly addressed whether there needs to be a judicial forum to vindicate all constitutional rights, it appears that the Court has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues, as well as construction of statutes that purport to limit the Court's jurisdiction.[17] At least one justice, however, has indicated that there have been particular cases, such as political question cases, where all constitutional review is in effect precluded.[18]

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[15] It should be noted, however, that a court may interpret this provision to be preclusive, which would appear to avoid any constitutional issues.

[16] *See Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). For a much more complete discussion of this issue, *see* CRS Report RL31271, *Limiting Court Jurisdiction Over Federal Constitutional Issues: "Court-Stripping,"* by Kenneth R. Thomas, Jan. 24, 2005.

[17] *See Johnson v. Robinson*, 415 U.S. 361, 366-67 (1974); *see also Weniberger v. Salfi*, 422 U.S. 749, 762 (1975); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 664, 681 n. 12 (1988); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Felker v Turpin*, 518 U.S. 651, 660-61 (1996); *INS v. St. Cyr*, 533 U.S. 289, 298, 314 (2001).

[18] *See Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting) ("Even apart from the strict text of the Constitution, we have found some constitutional claims to be beyond judicial

Nevertheless, the Court has generally found a requirement that effective judicial remedies be present. For example, in cases involving particular rights, such as the availability of effective remedies for Fifth Amendment takings, the Court has held that "the compensation remedy is required by the Constitution."[19] In addition, lower federal courts appear to have held that, in most cases, some forum must be provided for the vindication of constitutional rights.[20] Cases such as these would seem to provide a basis for the Court to find that parties seeking to vindicate other particular rights must have a judicial forum for such challenges; therefore, the Court may construe the provisions of H.R. 418 in a manner that preserves this right.

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review because they involve "political questions." . . . In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.").

[19] *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 (1987) (*citing Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306 (1923); *Monongahela Navigation v. United States*, 148 U.S. 312, 327 (1893)).

[20] *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d. Cir. 1948) (stating that "while Congress has the undoubted power to give, withhold, or restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power as to deprive any person of life, liberty, or property without due process or just compensation . . . ."). In addition, other judicial decisions point to the doctrine of sovereign immunity and the ability of the government to limit the remedies available to plaintiffs. *See Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987) (Bork, J., dissenting).